I am of opinion that the Act in question is unconstitutional and that the demurrer should be overruled.

Note.

This statute required all fire or lightning insurance companies doing business in any city, town, county or district in Virginia having a regular organized fire department, etc., to render an account to the commissioner of insurance of all premiums collected on business done within such cities, towns, etc., each year, and to pay a tax of one per cent thereon, to constitute a fund for the benefit of the Firemen's Relief Fund Association of each city, town, etc. The constitutionality of the statute was assailed on various grounds, only two of which are noticed in the opinion. The bill alleged that the corporations to which the proceeds of this tax were to be eventually paid over, were private corporations having no connection with the governmental organizations of the state or its political divisions, and that the payment of the tax in the first instance into the treasury of the state was a mere administrative incident, and did not alter the fact that it was levied for a private and not a public purpose. The other ground alleged was that it violated § 67, art. IV, of the Constitution, in that it made an appropriation to a charitable institution not owned or controlled by the state. Both of these objections seemed to have been well taken, and the decision of the Chancery Court against the constitutionality of this legislation seems to be thoroughly sound, and not to require any citation of authority to support it beyond the fundamental principles governing the power of the legislature in enacting statutes taxing one class for the benefit of another, and laying taxes for private and not public purposes.

J. F. M.

SUPREME COURT OF APPEALS OF VIRGINIA.

NORFOLK & PORTSMOUTH TRACTION CO. *v.* C. B. WHITE & BROS., Incorporated.

Jan. 18, 1912.

[73 S. E. 467.]

1. Vendor and Purchaser (§ 230*)—Bona Fide Purchaser—Notice.—Where defendant's deed recited that it was the intent of his grantor to convey all the property acquired by said grantor under a certain recorded deed, and that the property was subject to any easements created by the occupancy of a street railway, and the recorded deed referred to contained no reference to the easement of the street railway, it merely gave notice to the grantee that the street railway was in possession of part of the land conveyed, but not as to the railway's title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. § 230.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

2. Vendor and Purchaser (§ 232*)—Bona Fide Purchaser—Recording of Deed—Possession as Evidence of Title.—Code 1904, §§ 2463, 2464, 2465, respectively, provide that every contract for the sale or conveyance of real estate, not in writing shall be void as to bona fide purchasers and creditors; that any such contract, if in writing, from the time it is admitted to record shall be, as against creditors and purchasers, as valid as a deed conveying the property covered by the contract; and that every such contract in writing, or deed conveying any estate or term of years, as to subsequent purchasers and creditors, shall be void, unless duly recorded, provided that the possession of any such estate, without notice of other evidence of title, shall not be notice to subsequent purchasers. Held that, while the proper office of a proviso is to modify or restrain the enacting clause or preceding matter, and a proviso to a particular section does not apply to others, unless it is clear that its effect was intended to extend beyond the section immediately preceding it yet the proviso in this case applies to all of the preceding sections, because all were intended to perfect registry laws, and section 2463 was intended to place the purchaser of land under a parol agreement in the same condition as purchasers under a writing who had failed to record it; and hence the mere possession of a purchaser of land under a parol contract is not notice to a subsequent bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

Appeal from Law and Chancery Court of City of Norfolk.

Bill by the Norfolk & Portsmouth Traction Company against C. B. White & Bros., Incorporated. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Williams & Tunstall and *H. W. Anderson,* for appellant.
Tazewell Taylor, for appellees.

BUCHANAN, J. This is an appeal from a decree sustaining a demurrer to an amended bill filed by the appellant to restrain the appellee from prosecuting an action of ejectment to recover a small strip of land over which the appellant alleges that it has a perpetual right of way, acquired under a parol purchase from D. C. Foreman, who subsequently sold and conveyed the land over which the right of way passes to the John L. Roper Lumber Company, which company conveyed the land to the appellee.

The ground relied on to obtain the relief sought is that when the appellee acquired title to the land it had notice of the appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

lant's rights therein, by reason of a provision in the deed of the appellee and the fact that the appellant was in possession of the right of way, and was operating its street car line over it at that time.

[1] The appellee's deed contains the following statement, viz.:

"It is the intention of this deed to convey unto the parties of the second part all of the property acquired by the said party of the second part by a certain deed made to it by D. C. Foreman and wife dated on the 18th day of April, 1902, and of record in the office of the clerk of the corporation court of the city of Norfolk, Virginia, in Deed Book 134—B, page 222, to which reference is hereby made as part hereof, together with any additional rights, privileges or appurtenances obtained after the execution of the said deed by virtue of the change of the port warden's line, as made and adopted by the board of harbor commissioners on the 11th day of July, 1904, and subject to any easements (if any) acquired by the Berkley Street Railway by virtue of its occupancy of a part of said property, as shown on said plat, with its street railroad, the said party of the first part having given the said Berkley Street Railway no right so to occupy, or made no conveyance to it of any interest therein.

"The party of the first part convenants that it is seized in free simple of the aforesaid property; that the same is free from incumbrances; that it will execute such further assurances thereof as may be requisite and necessary, and that it will warrant generally the title thereto."

The only effect of the language quoted, as we construe it, and as seems to be conceded by the petition of the appellant for the appeal, when read in connection with the deed of Foreman to the appellee's grantor, which neither reserved nor made mention of the appellant's right of way, was, so far as it affects this case, to give notice to the appellee that the appellant was in the possession of a part of the land conveyed. The question, therefore, to be determined upon this appeal is whether or not a vendee of an interest in land of a greater extent than a term of five years, under a verbal contract, who has paid the purchase price, and is in possession of such interest, has superior rights to a subsequent grantee of the land who has no other evidence of the former's title than his possession.

[2] The decision of this question depends upon the effect of the proviso to section 2465 of Pollard's Code. If, as contended by the counsel of the appellant, that proviso only applies to possession taken under such contracts as are mentioned in section 2465, and not to possession taken under such contracts as are

described in section 2463, then the amended bill stated a case entitling the appellant to the relief sought.

Sections 2463, 2464, and 2465 of the Code are as follows:

"Sec. 2463. Contracts in consideration of marriage, or for the sale of real estate, and so forth, void as to creditors and purchasers unless in writing. Every contract, not in writing, made, in repect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall be void, both at law and in equity, as to purchasers for valuable consideration without notice and creditors.

"Sec. 2464. If in writing and recorded, as valid as deeds. Any such contract, if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

"Sec. 2465. Contracts, deeds, and so forth, that are void as to creditors and purchasers unless recorded. Every such contract in writing and every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels, and every bill of sale or contract for the sale of goods and chattels when the possession is allowed to remain with the grantor (and any such bill of sale or contract shall be in writing and signed by the vendor), shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed, or bill of sale may be: *Provided, that the possession of any such estate or term, without notice of other evidence of title, shall not be notice to said subsequent purchasers for valuable consideration.*"

As will be observed, section 2463 relates to contracts not in writing, while the provisions of sections 2464 and 2465 relate to written instruments.

Those sections are the same now as they were when the case of Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, was decided, except the language italicized in section 2465. That section was amended by adding that language after the decision in the case of Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846 was rendered. Acts of Assembly 1895-96, p. 842; 1897-98, p. 833; and 1899-1900, p. 89.

In that case it was held that a purchaser for value of real property in the possession of another was put upon his inquiry as to the rights of the one in possession, and is affected with knowledge of whatever rights such possessor has; and such knowledge was held to be the same in effect as the notice which is imputed by

the registry laws. The object of that amendment of section 2465, as generally understood by the courts and the legal profession, was to abolish the common-law doctrine of Chapman *v.* Chapman, and to provide that the possession of such estate or term, without notice of other evidence of title in such occupant, should not be notice to such subsequent purchaser for valuable consideration.

The contention of appellant's counsel is that the proviso in question only applies to a possession under a written instrument, such as is described in section 2465, of which the said proviso is a part, and that the common-law doctrine of Chapman *v.* Chapman is still in force as to contracts (unwritten) mentioned in 2463.

The general rule undoubtedly is that the appropriate office of a proviso is to restrain or modify the enacting clause or preceding matter, and that a proviso to a particular section does not apply to other sections. But if, from the context and a comparison of all the provisions relating to the same subject-matter, it is clear that it was intended to give the proviso an effect beyond the phrase immediately preceding it, or a scope beyond the section of which it is a part, it will be construed as restraining or qualifying preceding sections relating to the name subject-matter of the proviso, or as tantamount to the enactment of a separate section, without regard to its position and connection. Wartensleben *v.* Haithcock, 80 Ala. 565, 1 South. 38; Mayor *v.* Cumberland, 34 Md. 381; U. S. *v.* Babbit, 1 Black, 55, 61, 17 L. Ed. 94; Banking Co. *v.* Smith, 128 U. S. 174, 181, 9 Sup. Ct. 47, 32 L. Ed. 377; U. S. *v.* Whitridge, 197 U. S. 135, 143, 25 Sup. Ct. 406, 49 L. Ed. 696.

One of the objects of section 2463 was to abolish the doctrine of Floyd *v.* Harding, 69 Va. 401, and to place a purchaser of land under a parol contract, as to purchasers for valuable consideration, without notice, and creditors, in the same condition as purchasers under a writing, who had failed to register it as provided by sections 2464 and 2465. All three sections were intended to render more nearly perfect our registry laws, and might very properly have been embraced in one section. Sections 2464 and 2465 are so connected with and dependent upon section 2463 that they must be read with it, in order to ascertain what is meant by the terms "any such contract" and "every such contract in writing," as used in those sections, respectively. It is clear that before the proviso was added to section 2465 a person in possession of land under a contract, not in writing, and one in possession under a contract in writing, not recorded, were in the same condition as to subsequent purchasers for valuable consideration, without notice, and creditors. The doctrine of Floyd *v.* Harding, su-

pra, having been abolished, there is no reason why the possession of a purchaser of land under a contract, not in writing, should have any greater weight as evidence in determining the good faith of a subsequent purchaser than the possession of a purchaser under a written contract. There was not only no reason when the proviso was enacted why it should not apply alike to the possession of both classes of purchasers, but, unless it be so construed, it will fail to accomplish one of the objects for which, as before stated, it was passed, viz., to abolish the common-law doctrine of Chapman *v.* Chapman, supra; for in that case the prior purchaser was in possession under a contract not in writing.

For the foregoing reasons, the court is of opinion that the proviso in question was intended to apply, and should be construed as applying, to the possession of a prior purchaser of land, whether his purchase was under an unwritten contract, such as is mentioned in section 2463, or under a written instrument, such as is described in section 2465.

The court is further of opinion that the contract set up by the appellant was a contract "made in respect to real estate," within the meaning of sections 2463 and 2465 of the Code. 2 Minor on Real Property, §§ 97, 100; 2 Minor's Inst. 28.

It follows from what has been said that the court is of opinion that there is no error in the decree complained of, and that it must be affirmed.

Affirmed.

ALVIS *et al. v.* SAUNDERS *et al.*

March 14, 1912.

[74 S. E. 153.]

1. Judgment (§ 485*)—Invalidity on Face—Collateral Attack.—A decree, unauthorized on its face, may be attacked directly or collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.*]

2. Judgment (§ 486*)—Collateral Attack.—A decree of a court of competent jurisdiction in a suit between proper parties is conclusive, until reversed in some proper proceeding in the same suit and the same court or on appeal, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in another suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 919, 920-923; Dec. Dig. § 486.*]

3. Judgment (§ 504*)—Collateral Attack.—Decrees adverse to de-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.